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No. 80-1581

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS MATTIS, ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether respondents acted unlawfully in refusing to grant petitioners permission to conduct certain operations under a federal mineral lease when those operations threatened the continued existence of an endangered wildlife species.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A-1) and the order (*id.* at B-2 to B-3) and findings of fact and conclusions of law (R. 105-108)[1] of the district court are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1980. The petition for a writ of certiorari was filed on March 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the Excerpts of the Clerk's Record filed in the court of appeals.

STATEMENT

Petitioners are the owners and assignees of an oil and gas lease granted by the Secretary of the Interior under the Mineral Lands Leasing Act of 1920, 30 U.S.C. 181 *et seq.* The lease became effective August 1, 1968 (R. 106). Under the Mineral Lands Leasing Act, it was to expire after ten years, but if at the end of that period "actual drilling operations were commenced * * * and [were] being diligently prosecuted," the lease would be automatically extended for two additional years. 30 U.S.C. 226(e). In June and July of 1978, petitioners applied to various federal agencies—respondents in this case—for permission to deepen a well located near the lease site;[2] to improve a road providing access to that well; and to drill a well on the lease site. In each case, permission was denied (R. 105-106).[3] Because of those denials, petitioners were unable to begin drilling, and their lease expired at the end of the ten-year period.

The principal reason for denying the applications was that petitioners' proposed activities would threaten the continued existence of the California condor (R. 393). The California condor had been listed as an endangered species under the Endangered Species Conservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926, repealed by Pub. L. No. 93-205, Section 14, 87 Stat. 903, and under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* See 32 Fed. Reg. 4001 (1967); 40 Fed. Reg. 44420 (1975). Its critical habitat had also been designated. 41 Fed. Reg. 41916 (1976). Petitioners do not challenge the listing or designation.

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[2]Petitioners proposed to drill from that well to beneath the surface of the lease site (see Pet. App. D-3; R. 106).

[3]Petitioners also applied for a suspension of operations under the lease (R. 105). The Secretary of the Interior has the power to order such a suspension "in the interest of conservation." 30 U.S.C. 209. The lease is then extended for the period of the suspension. This application was also denied.

Section 7 of the Endangered Species Act of 1973 required all federal agencies "to insure that actions authorized * * * by them do not jeopardize the continued existence of * * * endangered species * * * or result in the destruction or modification of [a critical] habitat." 16 U.S.C. 1536 (current version at 16 U.S.C. (Supp. III) 1536(a)(2)).[4] The Fish and Wildlife Service of the Department of the Interior reported that, because of the noise and activity that would accompany the drilling proposed by petitioner, the drilling would be "likely to jeopardize the continued existence of the California condor and adversely modify its Critical Habitat" (Report of Secretary of Interior's Decision on Plaintiff's Applications for Suspension of Operations and Drilling Permit (filed in the district court September 19, 1979) at 10-12). Other biologists, emphasizing the proximity of petitioners' proposed operations to condor nests, reached the same conclusion (see *e.g., id.* at 28). On the basis of these reports, respondents denied petitioners' applications (see *id.* at 4-5).

2. Petitioners brought this action on July 26, 1978, in the United States District Court for the Central District of California. They asserted that the denials of permission were arbitrary and capricious, abuses of discretion, and unconstitutional (R. 105). They requested, among other things, an injunction requiring that their lease be extended and that they be granted the permission they sought. The district court denied a preliminary injunction (Pet. App. B-2 to B-3). It found that petitioners had failed to show that their proposed activities would not be detrimental to the

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[4]The Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3752, and Pub. L. No. 96-159, 93 Stat. 1226, amended Section 7, 16 U.S.C. 1536, but both were enacted after respondents' decisions in this case, and neither alters the substance of the passage quoted in text. Petitioners do not contend that these amendments affect the present case.

condor (R. 106-107). It held that respondents' decisions "were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (R. 108). The court of appeals summarily affirmed (Pet. App. A-1).

ARGUMENT

1. Petitioners appear to contend (Pet. 6, 10, 11) that respondents' decisions were arbitrary and capricious and an abuse of discretion. But respondents' decisions—based on the determination that granting petitioners' applications would be inconsistent with the Endangered Species Act—were supported by the record and were properly upheld by the district court and the court of appeals.

Petitioners offer no ground for questioning the factual basis of the administrative decisions they challenge. Their sole argument (Pet. 11) is that respondents have "failed to balance the * * * competing interests" in a proper way. In view of this Court's holding in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), that Section 7 of the Endangered Species Act of 1973 "admits of no exception" (*id.* at 173),[5] that "Congress intended endangered species to be afforded the highest of priorities" (*id.* at 174), and that Congress intended to subordinate agencies " 'primary missions' " to the preservation of endangered species (*id.* at 185), respondents scarcely can be accused of overemphasizing the protection of the California condor. In any event, the question of how properly to balance competing interests

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[5]Amendments to the Endangered Species Act, see note 4, *supra*, have provided for certain exceptions (see, *e.g.*, 16 U.S.C. (Supp. III) 1536(e)-(p)), but petitioners do not suggest that these amendments are relevant here.

is to be resolved in the first instance by the agencies administering the programs involved,[6] subject to the review of the district court and the court of appeals. That issue, which depends on the facts of this particular case, does not warrant review by this Court.[7]

2. Petitioners also contend (Pet. 5, 11) that respondents' actions amounted to a taking of property without just compensation in violation of the Fifth Amendment. This claim is without merit. The property interest petitioners acquired was specifically limited by the requirement that petitioners protect the condor and its habitat; the lease itself contained stipulations to that effect (see Pet. App. D-1 to D-2) and the Endangered Species Conservation Act of 1966 was in force when petitioners entered into the lease.[8] The condor had

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[6]This is particularly true here. Petitioners' lease provided (Pet. App. D-2):

> The determination of the Secretary of the Interior shall be final with respect to any disputed question, either of fact or of extent of right, use, or privilege, which may arise with respect to the provisions of these stipulations.

[7]Petitioners also assert that respondents violated the explicit terms of the lease by forbidding drilling that was not within one-half mile of a known condor nest (Pet. 10). The lease absolutely prohibited activity within one-half mile of a nest (Pet. App. D-1) but did not purport to authorize all other activity. Indeed, the lease explicitly required petitioners to adhere to federally imposed conditions "reasonably necessary to protect the Condors on the area" (*ibid.*). And petitioners identify nothing in the lease suggesting that their operations were exempt from the Endangered Species Act.

[8]The Endangered Species Conservation Act of 1966 was repealed by Section 14 of the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 903. The obligations imposed on federal agencies by the 1966 Act were not so strict as those imposed by the Endangered Species Act of 1973 (see *Tennessee Valley Authority* v. *Hill*, *supra*, 437 U.S. at 175-186). Section 1(b) of the 1966 Act required federal agencies to protect endangered species "insofar as is practicable and consistent with the[ir] primary purposes," and to preserve such species' habitats "on lands under their jurisdiction" (80 Stat. 926). But there is no reason to doubt that these provisions would have authorized the actions taken

already been listed as an endangered species when the lease was signed (32 Fed. Reg. 4001 (1967)).

Moreover, petitioners have not demonstrated that respondents' actions effectively prevented them from taking advantage of their lease by exploring for oil and gas. Petitioners waited until more than nine years and ten months of the ten-year term of their lease had elapsed before they proposed a method of exploration. The permission they needed to pursue that method was precluded by the Endangered Species Act, and because petitioners had waited so long their lease expired before they could propose a different method. Petitioners have failed to establish that there were no other ways in which they might have searched for oil and gas while still meeting respondents' requirements for protecting the condor. For this reason, petitioners have wholly failed to substantiate their claim that there was a taking.[9] See *Agins* v. *City of Tiburon*, 447 U.S. 255, 262-263 (1980); *Andrus* v. *Allard*, 444 U.S. 51, 64-68 (1979). All that petitioners have shown is that a regulatory program, which existed at the time their lease was granted and to which their lease itself alluded, affected their operations under the lease. Such regulation does not constitute a taking. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124-125 (1978).[10]

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by respondents here. In any event, petitioners had no protected expectation that the existing program would not be "buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958).

[9]Petitioners do not contend that they were denied an opportunity to show the extent to which the Endangered Species Act interfered with their leasehold interest.

[10]Petitioners rely on *Union Oil Co.* v. *Morton*, 512 F. 2d 743 (9th Cir. 1975), in support of their claim. That case involved a possible indefinite suspension of all activities on a mineral lease (*id.* at 750-751), not the limited denial of permission at issue here. Moreover, this Court does not ordinarily grant certiorari to resolve asserted conflicts between

3. Finally, petitioners contend (Pet. 5) that respondents "treated the lands involved herein as a withdrawn wilderness area under the Wilderness Act of 1964," 16 U.S.C. 1131 *et seq.* Petitioners contend that such an action violates the Wilderness Act and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* They also claim that the decision below conflicts with two decisions of the United States District Court for the District of Wyoming, *Rocky Mountain Oil and Gas Association* v. *Andrus*, 500 F. Supp. 1338 (D. Wyo. 1980), appeal pending, No. 80-1040 (10th Cir.), and *Mountain States Legal Foundation* v. *Andrus*, 499 F. Supp. 383 (D. Wyo. 1980).

These contentions are also without foundation. As we have noted, petitioners have not shown that respondents effectively barred all exploitation of the land. Respondents merely denied petitioners' applications for permission to conduct certain operations. Thus in no sense can respondents' action be described as "withdrawing" any land. It is true that one respondent agency asserted, as a secondary ground for denying one of the petitioners' applications, the possibility that the area involved might be included in the National Wilderness Preservation System (Complaint Exhibit H). But, as the district court found (R. 106), "the primary basis" for respondents' actions was the Endangered Species Act. And, as both courts below correctly held, the Endangered Species Act alone is a sufficient ground to sustain respondents' decisions. Accordingly, the Wilderness Act is not relevant to this case.

The Federal Land Policy and Management Act likewise has no bearing on this case. Section 701(f) of the Act expressly disclaims any intention to repeal by implication

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decisions of the same circuit. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

any other statute. 43 U.S.C. 1701(f) note. Therefore, actions required by the Endangered Species Act cannot be prohibited by the FLPMA.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]The district court decisions cited by petitioners (Pet. 6-9) deal only with the FLPMA and the Wilderness Act. They do not involve the Endangered Species Act. Accordingly, they have no bearing on the issues involved in this case.

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